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No.

# In the Supreme Court of the United States

PHILIP CRAWFORD, INTERIM FIELD OFFICE DIRECTOR, SEATTLE, WASHINGTON, UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT, ET AL., PETITIONERS

*v.*

ELIO RIVERON-AGUILERA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether the continued detention of a Mariel Cuban, who was apprehended at the border of the United States, was denied admission, and was subsequently ordered removed from the United States as a criminal alien, is lawful.

## PARTIES TO THE PROCEEDINGS

Petitioner Philip Crawford, Interim Field Office Director, Seattle, Washington, United States Immigration and Customs Enforcement, is the successor to the relevant responsibilities of Ronald J. Smith, who was a respondent below. Petitioner, United States Immigration and Customs Enforcement, is the successor to the relevant responsibilities of the former Immigration and Naturalization Service, which was a respondent below.[1]

Respondent is Elio Riveron-Aguilera.

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[1] On March 1, 2003, the functions of several border and security agencies, including those of the former Immigration and Naturalization Service, were transferred to the Department of Homeland Security and assigned within that Department to Immigration and Customs Enforcement. See Homeland Security Act of 2002, Pub. L. No. 107-296, § 441(2), 116 Stat. 2192 (to be codified at 6 U.S.C. 251(2)).

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# In the Supreme Court of the United States

No.

PHILIP CRAWFORD, INTERIM FIELD OFFICE DIRECTOR, SEATTLE, WASHINGTON, UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT, ET AL., PETITIONERS

*v.*

ELIO RIVERON-AGUILERA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of Philip Crawford, the Interim Field Office Director, Seattle, Washington, of United States Immigration and Customs Enforcement, Department of Homeland Security, and on behalf of United States Immigration and Customs Enforcement, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

## OPINIONS BELOW

The per curiam opinion of the court of appeals (App., *infra*, 1a-2a) is not reported. The original order of the district court (App., *infra*, 3a), and the order denying reconsideration (App., *infra*, 4a-8a) are not reported.

## JURISDICTION

The court of appeals entered its judgment on December 10, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Due Process Clause of the Fifth Amendment to the United States Constitution provides: "No person shall * * * be deprived of life, liberty, or property, without due process of law."

2. The Immigration and Nationality Act, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 305(a)(3), 110 Stat. 3009-598, provides, in relevant part:

> (6) Inadmissible or criminal aliens
>
> An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).

8 U.S.C. 1231(a)(6).

## STATEMENT

1. The Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*, has long authorized the Attorney General or, since March 1, 2003, the Secretary of Homeland Security to parole aliens seeking admission into the United States "temporarily under such conditions as he

may prescribe" and only for "urgent humanitarian reasons or significant public benefit." 8 U.S.C. 1182(d)(5)(A); 8 U.S.C. 1182(d)(5) (1976 & Supp. IV 1980). The Act makes clear, however, that the discretionary "parole of such alien shall not be regarded as an admission of the alien." 8 U.S.C. 1182(d)(5)(A); see generally *Fernandez-Roque* v. *Smith*, 734 F.2d 576, 578-579 (11th Cir. 1984); *Palma* v. *Verdeyen*, 676 F.2d 100, 101-102 (4th Cir. 1982). Section 1182(d)(5)(A) also provides that when, in the opinion of the Attorney General (or, now, the Secretary of Homeland Security), the purposes of the alien's parole have been served, the alien shall be returned to custody, "and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States." 8 U.S.C. 1182(d)(5)(A).

In the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 305(a)(3), 110 Stat. 3009-598, Congress mandated the detention, during the statutory 90-day removal period, of aliens who have been ordered removed from the United States, including aliens who have been stopped at the border and were regarded as "excludable" under prior law. 8 U.S.C. 1231(a)(2).[2]

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[2] Before IIRIRA, aliens subject to removal from the United States were divided into two statutory categories. Aliens seeking admission and entry into the United States were "excludable." See *Landon* v. *Plasencia*, 459 U.S. 21, 25, 28 (1982); 8 U.S.C. 1182 (1994). Aliens who had gained lawful admission to the United States or entered without permission were "deportable." See 8 U.S.C. 1251 (1994). Under IIRIRA, the new statutory category of "inadmissible" aliens includes both aliens who have not entered the country and formerly were termed "excludable," and aliens who entered the United States without permission and formerly were termed "deportable." See 8 U.S.C. 1182(a).

IIRIRA further provides that an alien ordered removed who is inadmissible under 8 U.S.C. 1182 or deportable due to the commission of a specified crime, or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, "may be detained beyond the [90-day] removal period." 8 U.S.C. 1231(a)(6).

2. Respondent is one of approximately 125,000 Cuban nationals, many of them convicted of crimes in Cuba, who attempted to enter the United States illegally during the 1980 Mariel boatlift. Gov't C.A. Mot. to Hold Appeal 3. After Cuba refused to accept the return of Mariel Cubans who were stopped at the border and denied entry into the United States, the Attorney General paroled most of those Cubans, including respondent, into the United States under 8 U.S.C. 1182(d)(5) (1976 & Supp. IV 1980).[3]

Within six months of his parole, respondent was convicted in California of maintaining a place for illicit drugs and of possessing and selling marijuana. Gov't C.A. Mot. to Hold Appeal 3. An immigration judge subsequently ordered respondent excluded, but the Cuban government would not accept his return. *Ibid.* In 1989, respondent was convicted in Illinois, under the alias of Francisco Gutierrez, of aggravated criminal

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[3] In 1984, the United States and Cuba reached an accord that addressed, *inter alia*, the return to Cuba of 2746 specified individuals with serious criminal backgrounds or mental disabilities. See Immigration Joint Communique Between the United States of America and Cuba, Dec. 14, 1984, T.I.A.S. No. 11,057, 1984 WL 161941. Approximately 1650 Mariel Cubans have been repatriated to Cuba under that accord. See generally *Gisbert* v. *Attorney General*, 988 F.2d 1437, 1439 n.4, as amended, 997 F.2d 1122 (5th Cir. 1993). The most recent repatriations occurred in January and February 2004.

sexual assault, rape with a gun, robbery, and kidnaping, for which he received a 15-year sentence. *Ibid.* He later was convicted in Illinois of theft, for which he was sentenced to two years in prison. Gov't C.A. Mot. to Hold Appeal 4. Respondent was returned to federal custody in September 1999, and the Immigration and Naturalization Service denied his release on parole in March 2001 because of his recidivist criminal behavior, lack of credibility regarding his criminal record, and inability to accept responsibility for his past crimes. *Ibid.*

3. On September 6, 2001, respondent filed a petition for a writ of habeas corpus, seeking release on the ground that this Court's decision in *Zadvydas* v. *Davis*, 533 U.S. 678 (2001), which precluded the indefinite detention of deportable lawful permanent resident aliens who cannot be returned, was applicable to excludable aliens who have not formally been admitted to the United States. On October 30, 2002, the district court granted respondent's habeas petition, without opinion. App., *infra*, 3a. The court subsequently denied the government's motion for reconsideration, relying on Ninth Circuit precedent extending *Zadvydas* to excludable aliens. App., *infra*, 4a-8a. In March 2003, the INS released respondent to a halfway house pursuant to the district court's order.

4. The court of appeals summarily affirmed the district court's decision based on its earlier decision in *Martinez-Vazquez* v. *INS*, 346 F.3d 903 (9th Cir. 2003), petition for cert. pending (filed Dec. 30, 2003) (No. 03-920). See App., *infra*, 1a-2a.

## DISCUSSION

On January 16, 2004, this Court granted review in *Benitez* v. *Mata*, No. 03-7434, to address the lawfulness

of the detention of a Mariel Cuban who was apprehended at the border of the United States, was denied admission, and was subsequently ordered removed from the United States as a criminal alien. On March 1, 2004, this Court granted review in *Crawford* v. *Martinez*, No. 03-878, which also presents that question. The government's petition in this case seeks review of the same question presented in *Benitez* and *Crawford*. Therefore, this case should be held pending the Court's decision in *Benitez* v. *Mata*, No. 03-7434, and *Crawford* v. *Martinez*, No. 03-878, and disposed of in accordance with the Court's decision in those cases.

## CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Benitez* v. *Mata*, No. 03-7434, and *Crawford* v. *Martinez*, No. 03-878, and then disposed of in accordance with the Court's decision in those cases.

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MARCH 2004

**APPENDIX A**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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No. 03-35090
D.C. No. CV-01-01326-OMP

ELIO RIVERON-AGUILERA, PETITIONER-APPELLEE

*v.*

IMMIGRATION AND NATURALIZATION SERVICE, ET AL., RESPONDENTS-APPELLANTS

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**MEMORANDUM***

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Appeal From The United States District Court
For The District Of Oregon Owen M. Panner,
Senior Judge, Presiding

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Submitted December 8, 2003**
[Filed Dec. 10, 2003]

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Before: FISHER, GOULD and CALLAHAN, Circuit Judges

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

**This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

Appellee's motion for summary affirmance is granted. *See United States* v. *Hooton*, 693 F.2d 857, 858 (9th Cir. 1982) (per curiam) (stating standard for summary disposition) *Martinez-Vasquez* v. *INS*, 346 F.3d 903 (9th Cir. 2003) (holding agency lacked authority to detain inadmissible alien indefinitely). Accordingly, we summarily affirm the district court's judgment. All other pending motions are denied as moot.

**AFFIRMED.**

**APPENDIX B**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

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CV 01-1326-PA

ELIO RIVERON-AGUILERA, PETITIONER

*v.*

RONALD J. SMITH, DISTRICT DIRECTOR, DISTRICT OF OREGON, IMMIGRATION AND NATURALIZATION SERVICE, ET AL, RESPONDENTS

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**ORDER**

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Petitioner's motion for judgment (#16) is granted. Respondents' motions for stay (##17 and 18) are denied. The petition for habeas corpus relief (#1) is granted. Respondents are ordered to release petitioner immediately subject to reasonable conditions.

DATED this 30th day of October, 2002.

/s/ OWEN M. PANNER
OWEN M. PANNER
U.S. DISTRICT JUDGE

**APPENDIX C**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

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CV 02-970-PA

CARLOS OCANO-GONZALEZ, PETITIONER

*v.*

RONALD J. SMITH, ET AL., RESPONDENTS

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CV 01-1326-PA

ELIO RIVERON AGUILERA, PETITIONER

*v.*

RONALD J. SMITH, ET AL., RESPONDENTS

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**ORDER**

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Before: PANNER, J.

I ordered the release of petitioners Carlos Ocano-Gonzalez and Elio Riveron Aguilera. Respondents now move to reconsider and stay the orders. I deny the motion.

**BACKGROUND**

Petitioners are citizens of Cuba who emigrated to the United States in 1980 during the Mariel boat lifts. Both petitioners were convicted of felonies after the INS paroled them into the United States. By 1990, each petitioner had received a final order of exclusion.

Petitioners have been in and out of state custody and INS detention. Currently, the INS has detained Ocano-Gonzalez since November 1998, and Aguilera since September 1999.

**DISCUSSION**

In *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001), the Court held that 8 U.S.C. § 1231, which authorizes detention of aliens pending removal, does not permit the INS to detain an alien indefinitely when there is no reasonable likelihood of removal. The petitioners in *Zadvydas* were resident aliens subject to removal because of criminal convictions.

In *Lin Guo Xi v. United States INS*, 298 F.3d 832 (9th Cir. 2002) (*Xi*), the Ninth Circuit held that *Zadvydas*'s interpretation of § 1231 applied not only to resident aliens but also to inadmissible (formerly termed excludable) aliens. 298 F.3d at 835-37. Petitioners here are inadmissible aliens. The INS detained these petitioners for more than six months after issuing final orders of exclusion, and there was no reasonable likelihood that Cuba would accept petitioners' repatriation. I reluctantly concluded that *Xi* left me no choice but to order the release [of] these petitioners, despite their serious criminal histories.

Respondents seek reconsideration. They contend that the statute interpreted by *Xi*, 8 U.S.C. §1231(a), does not govern petitioners' detention because the INS issued petitioners' final orders of exclusion before the effective date of § 1231, April 1, 1997. Respondents contend that petitioners' detention is governed instead by former 8 U.S.C. § 1226(e) (1994) (repealed), and that § 1226(e) does allow the indefinite detention of Mariel Cubans. *See Barrera-Echavarria v. Rison*, 44 F.3d

1441, 1448 (9th Cir. 1995 (en banc) (construing former § 1226(e)).

Section 1231, together with many other provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), took effect April 1, 1997. *Chavez-Rivas v. Olsen*, 207 F. Supp. 2d 326, 332 (D. N.J. 2002). Congress, however, decided that some provisions of the IIRIRA, including § 1231, would not apply retroactively to an alien "'who is in exclusion or deportation proceedings as of the . . . effective date [April 1, 1997].'" *Id.* (quoting IIRIRA § 309(c)(1)). Respondents contend that IIRIRA § 309(c)(1) prohibits the application of 8 U.S.C. § 1231 to these petitioners because petitioners received final orders of exclusion before 1997.

I disagree with respondents' interpretation of IIRIRA § 309. Section 309, which is entitled "Transition for Aliens in Proceedings," applies to an alien "who *is in* exclusion or deportation proceedings" as of April 1, 1997. (Emphasis added.) Congress's use of the present tense in the phrase "is in" means that IIRIRA § 309's exception applies only to aliens who were in pending exclusion or deportation proceedings as of April 1, 1997. *See Chavez-Rivas*, 207 F. Supp. 2d at 333 (applying IIRIRA § 309 to aliens whose proceedings had terminated by April 1997 "transforms 'is in' to 'has been in' or 'has begun'"); *Soto-Ramirez v. Ashcroft*, 2002 WL 31420763, at *3 (M.D. Pa. Oct. 29, 2002); *Zadvydas v. Underdown*, 185 F.3d 279, 286-87 & n.7 (5th Cir. 1999) ("[t]he natural reading of the clause [in § 309(c)(1)] would thus seem to be that it applies only to proceedings that are pending as of the effective date"), *vacated and remanded on other grounds*, 533 U.S. 678 (2001). Here, petitioners were no longer in exclusion

proceedings as of April 1997, so IIRIRA § 309(c)(1) does not apply to them.

As petitioners point out, in *Zadvydas*, the Supreme Court construed 8 U.S.C. § 1231 as the statute governing detention, even though one of the two petitioners there had received a final order of deportation before April 1997. Respondents contend that the applicability of § 1231 was not at issue when Zadvydas's petition reached the Supreme Court. *See Zadvydas v. Underdown*, 185 F.3d at 286-87 (court agreed with parties that § 1231 applied to an alien whose final order of deportation was issued before 1997). Regardless of whether the Supreme Court expressly adopted the statutory interpretation suggested by petitioners, I agree with the Fifth Circuit's reasoning in *Zadvydas v. Underdown* on this issue. *See also INS v. St. Cyr*, 533 U.S. 289, 318 (2001) (IIRIRA § 309 applies to "removal proceedings pending on the effective date of the statute").

Even ignoring IIRIRA § 309's use of the present tense, I would still conclude that 8 U.S.C. § 1231 applies here. *See Chavez-Rivas*, 207 F. Supp. 2d at 333. IIRIRA § 309(c)(1) is "best read as merely setting out the *procedural* rules to be applied to removal proceedings pending on the effective date of the statute." *St. Cyr*, 533 U.S. at 318. The *St. Cyr* Court quoted a Conference Report explaining that § 309(c) "'provides for the transition to new *procedures*.'" *Id.* (quoting H.R. Conf. Rep. No. 104-828, at 222 (1996) (*St. Cyr* Court's emphasis.) Section 1231 governs detention, so it is not merely a procedural statute. *See Chavez-Rivas*, 207 F. Supp. 2d at 333.

Respondents argue that there is a crucial distinction between excludable aliens, such as these petitioners,

and deportable aliens, such as the petitioners in *Zadvydas*. In *Xi*, the Ninth Circuit held that § 1231 made no such distinction, a distinction based on the now repealed statutory scheme. Respondents have not shown why this distinction justifies applying the repealed detention statute. I do not read IIRIRA § 309 as requiring that removable aliens be subject to § 1231 while inadmissible aliens are still subject to former § 1226. *See Chavez-Rivas*, 207 F. Supp. 2d at 333 ("I fail to see the relevance of that distinction here. . . . Nor is there any evidence that the INS's conclusion is based on underlying policy concerns, or indeed, on reasoned deliberation of any kind.").

Even if former § 1226(e) did apply, I would reach the same conclusion. As petitioners argue, the former statutory scheme governing detention (which also included 8 U.S.C. §§ 1227(a) and 1182(d)(5)(A)), did not expressly authorize indefinite detention of an alien after the INS had issued a final order of exclusion. The former statutory scheme would be subject to the same analysis that the *Zadvydas* Court gave to § 1231. *See Zadvydas*, 533 U.S. at 689 (§ 1231 does not authorize indefinite detention even though it sets no limit on the duration of detention beyond the 90-day removal period).

**CONCLUSION**

Respondents' motion to reconsider and stay mandate (docket #26 in CV 02-970 and docket #24 in CV 01-1326) is denied.

DATED this 6 day of December, 2002.

/s/ OWEN M. PANNER
OWEN M. PANNER
U.S. DISTRICT JUDGE